INTERIOR BOARD OF INDIAN APPEALS

Hannahville Indian Community v. Minneapolis Area Education Officer and Area Supervisory Contract Specialist, Bureau of Indian Affairs

34 IBIA 4 (06/08/1999)

Related Board cases:
34 IBIA 252
37 IBIA 35

Related Indian Self-Determination Act case:
Administrative Law Judge decision, 04/23/1999

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

HANNAHVILLE INDIAN COMMUNITY
v.
MINNEAPOLIS AREA EDUCATION OFFICER and
AREA SUPERVISORY CONTRACT SPECIALIST,
BUREAU OF INDIAN AFFAIRS

IBIA 97-143-A Decided June 8, 1999

Appeal from an Administrative Law Judge's decision recommending that an appeal under the Indian Self-Determination Act be denied for failure to submit a tribal resolution.

Recommended Decision not accepted; matter returned to the Administrative Law Judge.

1. Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

   Under 25 C.F.R. § 900.15(b), the agency receiving a contract proposal under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1994), must notify the applicant if any information required by 25 C.F.R. § 900.8 is missing, and must give the applicant an opportunity to cure the deficiency.

APPEARANCES: Dawn S. Duncan, Esq., Wilson, Michigan, for the Hannahville Indian Community; Kara Pfister, Esq., Office of the Field Solicitor, Ft. Snelling, Minnesota, for the Minneapolis Area Education Officer and the Area Supervisory Contract Specialist.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Hannahville Indian Community seeks review of a Recommended Decision issued on April 23, 1999, by Administrative Law Judge William S. Herbert in a matter arising under the Indian Self-Determination Act (ISDA), 25 U.S.C. §§ 450-450n (1994). Judge Herbert recommended that Appellant's appeal be denied because of the lack of a legally sufficient tribal resolution. For the reasons discussed below, the Board of Indian Appeals (Board)

declines to accept this recommendation and returns the matter to Judge Herbert for a decision on the merits.

Background

On September 11, 1996, representatives of Appellant hand delivered to the then Assistant Secretary - Indian Affairs (Assistant Secretary) a proposal under ISDA for the purpose of leasing certain parts of the Hannahville school facility. When Appellant did not receive a response to its proposal, on January 13, 1997, it wrote to the Education Programs Administrator at the Minneapolis Area Office, Bureau of Indian Affairs (Area Office; BIA). Appellant noted that it had been 124 days since it submitted its proposal to the Assistant Secretary; stated that under the ISDA and its implementing regulations, the proposal was approved; and requested that BIA "proceed with the issuance of a lease contract."

Area Office personnel indicated that they had no knowledge of Appellant's submission of a proposal to the Assistant Secretary. 1/ Appellant states that it hand delivered a certified duplicate original of its proposal to the Area Office on January 24, 1997. A meeting was held between representatives of Appellant and the Area Office on January 27, 1997.

Representatives of the Lac Courte Oreilles Tribe apparently informed Appellant that there might be a problem with Appellant's proposal because of a perceived lack of an authorizing tribal resolution. On March 3, 1997, Appellant's Tribal Council adopted Resolution No. 030397-F, which approved the contract proposal and authorized the Tribal Chairman to negotiate and execute any contract. Appellant asserts that this resolution was delivered to the Area Office prior to the issuance of the declination decision.

On April 7, 1997, the Minneapolis Area Education Officer and the Area Supervisory Contract Specialist declined Appellant's contract proposal. Their letter stated at page 1:

> The program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of the programs, functions, services, or activities covered under [25 U.S.C. § 450f(a)(1)] because the proposal includes activities that cannot lawfully be carried out by the contractor, see attached letter from Field Solicitor dated March 20, 1997.

1/ A substantially identical proposal made by the Lac Courte Oreilles Tribe, which had also been presented to the Assistant Secretary on Sept. 11, 1996, was timely declined by the Minneapolis Area Education Officer and the Area Awarding Official on Dec. 9, 1996.

After noting that the original proposal delivered to the Assistant Secretary had not been located, the letter continued:

> [The copy of the proposal submitted to the Area Office] did not contain an authorizing Tribal Resolution as required by [25 U.S.C. § 450f(a)(1)]. It may be determined that the original proposal also did not contain an authorizing Tribal Resolution. If so, the Secretary, in accordance with the Act is not authorized to act upon, or enter into contracts without an authorizing Tribal Resolution.

Id. at 2. 2/

Appellant requested an informal conference on the declination decision. A conference was held on June 3, 1997. On June 13, 1997, the conference Facilitator issued a report in which she concluded that Appellant's proposal was properly declined.

The Board received Appellant's initial appeal on July 14, 1997. On July 16, 1997, it referred the appeal to the Hearings Division of the Office of Hearings and Appeals (OHA) for assignment to an Administrative Law Judge. Later on July 16, 1997, the Acting Director, OHA, assigned this matter to Administrative Law Judge Vernon J. Rausch.

On August 7, 1997, Administrative Judge Larry Meuwissen held a telephonic prehearing conference with the parties on behalf of Judge Rausch. Although Appellant had asked for an evidentiary hearing in its notice of appeal, a Scheduling Order issued by Judge Meuwissen on August 8, 1997, stated that counsel for the parties "had conferred and concluded that this case does not require an evidentiary hearing and will be submitted on a stipulation of facts and an agreed administrative record." Aug. 8, 1997, Order at 1. The parties' joint stipulation of facts was received on August 29, 1997, and the agreed-upon administrative record was received on October 10, 1997.

Appellant relied on the opening brief filed with its notice of appeal. BIA filed an answer brief, and Appellant filed a reply brief.

Judge Rausch retired on August 30, 1997. This matter was apparently reassigned to Judge Herbert when he entered on duty in April 1998. By a document dated May 8, 1998,

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2/ At pages 2-3 of its answer brief, BIA states that "[t]he original application was subsequently located in a bookshelf in the Assistant Secretary's office in Washington, D.C." The original application is not part of the record.

the parties agreed that the record on which Judge Herbert should issue his recommended decision consisted of the parties' three briefs; the August 25, 1997, joint stipulation of facts; and the agreed-upon administrative record received on October 10, 1997.

Judge Herbert issued his Recommended Decision on April 23, 1999. The Board received Appellant's objections to the Recommended Decision on May 20, 1999. 25 C.F.R. § 900.167(a) provides that the Board has 20 days from its receipt of an appeal from an Administrative Law Judge's recommended decision in which to issue a decision. Therefore, the Board's decision in this appeal must be issued on or before June 9, 1999.

Discussion and Conclusions

In paragraph 4, page 2, of his Recommended Decision, Judge Herbert recommends that Appellant's appeal be denied "due solely to the lack of a legally sufficient tribal resolution as a *statutorily necessary antecedent part* of the Appellant's application for lease at any time while the application was under Secretarial consideration." The Judge found that the proposal did not include anything which could be deemed to be a tribal resolution and that there was no proof that the March 3, 1997, tribal resolution was submitted to BIA prior to the issuance of the April 7, 1997, declination decision.

The submission of a tribal resolution is required by 25 U.S.C. § 450f(a)(1) which provides: "The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts." This statutory requirement is repeated in the implementing regulations at 25 C.F.R. § 900.8, which provides in pertinent part: "An initial contract proposal must contain the following information: * * * (d) A copy of the authorizing resolution from the Indian tribe(s) to be served."

Appellant first contends that its proposal included a tribal resolution, although not in "conventional" form. It argues that the September 11, 1996, letter transmitting its contract proposal to the Assistant Secretary is a tribal resolution. The September 1996 letter is signed by Appellant's Tribal Chairman, "On Behalf of the Hannahville Community Tribal Council." Appellant contends that BIA has not argued that this document is not what it purports to be, i.e., a request written on behalf of the Tribal Council, but has instead merely challenged the form in which Appellant chose to submit its tribal resolution.

The Board is not persuaded that the September 1996 letter from Appellant's Tribal Chairman is anything more than it appears to be--i.e., a letter transmitting Appellant's contract proposal to the Assistant Secretary. Nothing in that letter, including the line "On Behalf of the Hannahville Community Tribal Council," shows consideration and authorization of the

contract proposal by Appellant's Tribal Council. The Board agrees with Judge Herbert that this letter is not a tribal resolution.

Alternatively, Appellant asserts that once it learned--from a third party--that its proposal might be deemed to lack a tribal resolution, it immediately obtained a more conventional resolution and submitted it to the Area Office prior to the issuance of the declination decision. The copy of the resolution in the agreed-upon administrative record does not show a date of receipt by BIA but, at page 5 of its answer brief in this appeal, BIA admits receipt of this tribal resolution in March 1997.

Appellant contends that because it submitted a tribal resolution prior to the issuance of the declination decision, its proposal cannot be declined on the grounds that it did not include a tribal resolution. In support of this argument, Appellant cites the Board's decision in Tanana Chiefs Conference, Inc. v. Acting Associate Alaska State Director, Bureau of Land Management, 33 IBIA 51 (1998).

[1] In Tanana Chiefs Conference the Bureau of Land Management (BLM) objected to Administrative Law Judge Nicholas T. Kuzmack's citation of legislative history from 1987 in holding that the failure to include a tribal resolution with the initial contract proposal was not fatal to the proposal. At page 10 of his recommended decision in Tanana Chiefs Conference, Judge Kuzmack stated:

> Congress made clear in enacting the 1988 amendments to [ISDA] that the purpose of [tribal] resolutions is to strengthen "the control of tribes over the decision to contract or not to contract." S. Rept. No. 100-247, December 21, 1987. The requirement for such resolutions, however, "is not intended to allow Federal agencies to use the resolution process as an obstacle to requests to enter into contracts." Id.

BLM contended that the present versions of 25 U.S.C. § 450f(a)(1) and 25 C.F.R. § 900.8(d) require the tribal resolution to be filed with the initial contract proposal, and that Judge Kuzmack improperly based this part of his recommended decision on committee language which predated the 1988 and 1994 amendments to ISDA and the 1996 final regulations.

The Board rejected BLM's argument, citing 25 C.F.R. § 900.15, which provides in pertinent part: "Upon receipt of a proposal, the Secretary shall: * * * (b) Within 15 days notify the applicant in writing of any missing items required by § 900.8 and request that the items be submitted within 15 days of receipt of the notification." It held that section 900.15(b) "clearly puts the burden on the government to notify an applicant of any items which are required by 25 C.F.R. § 900.8, but which were not included with the initial proposal, and just as clearly

gives the applicant an opportunity to cure any such deficiency." 33 IBIA at 53. The Board agreed with Judge Kuzmack that "the failure to submit tribal resolutions with the initial proposal is not fatal." Id.

The Board has reexamined its holding in Tanana Chiefs Conference in light of Judge Herbert's Recommended Decision and the arguments raised in this appeal. It finds no reason to depart from that holding. However, it adds the following comments.

Proposed regulations implementing ISDA, published at 59 Fed. Reg. 3166 (Jan. 20, 1994), included proposed section 900.206, which was the counterpart of present 25 C.F.R. § 900.15, and which provided in pertinent part:

> (a) Upon receipt of a contract proposal, the Secretary shall:
>
> (1) Within 5 days notify the applicant in writing that the proposal has been received. If the proposal does not contain the required resolutions, it will be returned without further action.
>
> * * * * * * * *
>
> (3) Within 15 days, notify the applicant in writing of any missing items required pursuant to [proposed] § 900.205. The notification shall require that the missing items be submitted within 15 days of such notification. [Emphasis added.]

As does present 25 C.F.R. § 900.8, proposed section 900.205 required the inclusion of a tribal resolution with the contract proposal.

The emphasized language in proposed section 900.206(a)(1) was removed in the second set of proposed regulations (see proposed sec. 900.13(a), 61 Fed. Reg. 2038, 2053 (Jan. 24, 1996)), and in the final regulations. The preamble to the final regulations states:

> A comment suggested amending § 900.15(a) to require the Secretary to return any proposal lacking the required authorizing resolution(s) to the applicant without further action. This suggestion was not adopted because § 900.15(b) requires that the applicant be notified of any missing information. It should be clear, however, that [25 U.S.C. § 450f(a)(2)] only requires the Secretary to consider a proposal if "so authorized by an Indian tribe" pursuant to the tribal resolution required under [25 U.S.C. § 450f(a)(1)]. Therefore, although technically outside of the enumerated

> declination criteria in [25 U.S.C. § 450f(a)(2)], it is also clear that [ISDA] precludes the approval of any proposal and award of any self-determination contract absent an authorizing tribal resolution.

61 Fed. Reg. 32482, 32486 (June 24, 1996).

It is thus clear that the negotiated rulemaking committee which drafted the final regulations consciously chose to require the agency receiving an ISDA contract proposal to notify an applicant of missing information, including the statutorily required tribal resolution, and to give the applicant an opportunity to submit the missing information. As to missing tribal resolutions, this choice may have been based in part on legislative history, such as that cited by Judge Kuzmack in his recommended decision in Tanana Chiefs Conference.

To the extent it may be argued that 25 C.F.R. § 900.15(b) exceeds the grant of authority in 25 U.S.C. § 450f(a)(1), the Board repeats its statement in Tanana Chiefs Conference, 33 IBIA at 53, that it lacks authority to declare a duly promulgated Departmental regulation invalid.

Furthermore, the Board has previously discussed regulations which grant rights not specifically required by a statute. In Aleutian/Pribiloff Islands Ass'n, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 9 IBIA 254, 89 I.D. 196 (1982), the Board considered a regulation that, similarly to 25 C.F.R. § 900.15(b), required BIA to notify the applicant of deficiencies in a grant application and to give the applicant an opportunity to cure those deficiencies. The regulation at issue in Aleutian/Pribiloff Islands Ass'n was 25 C.F.R. § 23.29 (1981). The Board held that the regulation "create[d] substantive rights to advance notification of possible disapproval of a grant application and to assistance as available in remedying the problems in the application." It continued:

> Although the [Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963,] did not require the Secretary of the Interior to adopt this particular regulation, the regulation was clearly within his discretionary authority to establish in implementation of the statute. Once this regulation was adopted, and so long as it remains extant, the Secretary and his representatives are bound by it and it has the force and effect of law.

9 IBIA at 260, 89 I.D. at 199. See also Urban Indian Council, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 146, 151 (1983).

In reaching its conclusion as to 25 C.F.R. § 23.29 (1981), the Board relied on, inter alia, Service v. Dulles, 354 U.S. 363, 388 (1957), in which the Supreme Court held:

> While it is of course true that under the [act at issue] the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, * * * and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.

The Board holds that 25 C.F.R. § 900.15(b) grants an applicant for an ISDA contract a substantive right to be notified if any of the information required by 25 C.F.R. § 900.8 is missing from its application, and gives it an opportunity to cure any such deficiency. The statutory requirement for an authorizing tribal resolution is one of the pieces of information which is included under section 900.8. Thus, section 900.15(b) imposes an obligation on the agency receiving an ISDA contract proposal to inform the applicant if the proposal is lacking a tribal resolution. Once this regulation was adopted, the agencies were bound by it and it had the force and effect of law.

While conceding that 25 C.F.R. § 900.15(b) requires notification to applicants of missing information, BIA contends that it could not have awarded a contract to Appellant without a supporting resolution.

The Board need not address this contention because Appellant has submitted a supporting resolution. Although information about BIA's receipt of Appellant's March 3, 1997, tribal resolution was missing from the record before Judge Herbert, BIA has now conceded that it received the resolution in March 1997, prior to making its declination decision. Thus, to the extent the BIA officials relied on the lack of a resolution to decline Appellant's proposed contract, they were in error. The Board declines to accept Judge Herbert's recommended decision and returns this case to him for consideration of the merits of BIA's declination letter.

Appellant objects to statements concerning the merits of the appeal which appear in a section of the Recommended Decision entitled "Additional Comments." Judge Herbert specifically stated that this section of the Recommended Decision was dicta, but indicated that he included it because both parties stated they wanted "a thoughtful and deliberative decision as to the case itself and for the benefit of the cooperative relationship between" them. Recommended Decision at 3. Because this case is being returned to Judge Herbert, Appellant should raise these concerns with the Judge.

Appellant requests a hearing on the record. This request should be addressed to Judge Herbert.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Herbert's April 23, 1999, Recommended Decision is not accepted, and this matter is returned to him for a decision on the merits.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge